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The Doctrine of Last Clear Chance

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NOTES

THE DOCTRINE OF LAST CLEAR CHANCE

The rule which is the subject of this article is most generally known as "The Doctrine of Last Clear Chance." However, it has in a number of instances been termed the "Humanitarian Doctrine" or "The Humanity Rule." Some of the early cases refer to it as "the rule in *Davies* v. *Mann.*" Further, the term "Doctrine of the Last Clear Chance" has been used in personal injury cases to designate the doctrine of discovered peril.[1] From reading the cases and the decisions in the several jurisdictions of the United States considerable distinction can be made between "the doctrine of the last clear chance" and the "humanitarian doctrine." It is the object of the writer to point out this distinction.

The last clear chance rule was first enunciated and affirmed by the English courts, and is strongly supported in this country. The origin of the doctrine of last clear chance is generally attributed to the English case of *Davies* v. *Mann.*[2] The decision in this case was handed down in 1842. Here the plaintiff left his donkey fettered on a public highway and the defendant, driving at an improper pace, injured the donkey, which could not get out of the way. The judge directed the jury that if the accident might, notwithstanding the negligence of the plaintiff, have been avoided by the exercise of ordinary care on the part of the driver of the wagon, the defendant was responsible and the jury found for the plaintiff. That direction was upheld by the court. "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage on the wrong side of the road."[3] The principal authority for the rule in the case of

[1] *Eruger* v. *Omaha, etc., R. Co.*, 80 Nebr. 490.

[2] 10 M. & W. 546, 549.

[3] To this case McClean J. of the Mississippi Supreme Court, has paid the following tribute: "The groans, ineffably and mournfully sad, of Davie's dying donkey, have resounded around the earth. The last lingering gaze from the soft, mild eyes of this docile animal, like the last parting sunbeams of the softest days in spring, has appealed to

Davis v. *Mann* was the opinion in the case of *Bridge* v. *Grand Junction Railway Company.*[4]

Bouvier, in the way of general definition, says that the doctrine of the last clear chance is as follows: "It is that the party who last has a clear opportunity of avoiding an accident, notwithstanding the negligence of the other party, is considered responsible for it."

It appears that the doctrine is applied on the broadest principles of public policy. In many opinions the rule has been put on the idea of wilfulness, recklessness or wantonness. This view of it possibly sprang from the proposition that contributory negligence is never a defense against a wilful or wanton wrong.[5] It is probably from this latter view that we get the terms "humanitarian doctrine" and " humanity rule." In the more recent cases, however, the humanitarian rule is no longer put on the presence of wilfulness or intentional wrong but is reasoned not from the viewpoint of tender regard for life and limb, and the doctrine is applied on negligence pure and simple. The court in *Murphy* v. *Wabash Railroad Co.* says, "This rule of last clear chance is recognized by the court as an exception to the general rule that the contributory negligence of the person injured will bar a recovery, without reference to the degree of negligence on his part."

In Chapin on Torts:[6] "It (the last clear chance) is frequently declared to be irreconcilable with or an exception to the doctrine of contributory negligence, but rightly considered it is neither. The question is simply whether the plaintiff's negligence is a remote or proximate cause of the injury." In Clerk and Lindell on Torts:[7] "If the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse the defendant."

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and touches the hearts of men. There has girdled the globe a band of sympathy for Davies' 'immortal' critter. Its ghost, like Banquo's, will not down at the behest of the people who are charged with inflicting injuries, nor can its groaning be silenced by the ranting excoriations of carping critics."

[4] 3 M. & W. 246.

[5] *Murphy v. Wabash R. R. Co.*, 228 Mo. 56.

[6] p. 544.

[7] p. 501.

In *Lambert* v. *Southern Pacific Railroad Co.*:[8] "The party who has a last clear opportunity to avoid inflicting injury is responsible if without exercising ordinary care he fails to do so."

It is noticeable in all the cases that the knowledge of danger on the part of the defendant enters as an element in varying degrees. In *St. Louis Southwestern R. Co.*[9] the principle upon which the doctrine of discovered peril is based had no application in the absence of actual knowledge on the part of the person causing the injury of the peril of the injured person in time to prevent the injury by the use of means within his reach. While in *Guenther* v. *St. Louis, etc. R. Co.*[10] it is extended to where the defendant might have discovered the plaintiff's peril by the exercise of reasonable case; or, as in *Buxton* v. *Ainsworth*,[11] where the defendant might have discovered the plaintiff's peril by ordinary precaution, or, further still, in *Klockenbrink* v. *St. Louis, etc. R. Co.*,[12] where not knowing of the danger the defendant had sufficient notice to put a prudent man on the alert.

The most common defense against the application of the last clear chance doctrine is that of concurring negligence on the part of the plaintiff. Resorting to Bouvier again: "If the plaintiff, by ordinary care, could have avoided the effect of the negligence of the defendant, he is guilty of contributory negligence, no matter how careless the defendant may have been at the last or any preceding stage." In *Denver City Tramway Co.* v. *Cobb*,[13] the court ruled that the "last clear chance doctrine did not apply where there was no negligence of the defendant supervening subsequently to that of the plaintiff, as where his negligence was continuous and operative down to the moment of the injury, or where his negligence or position of danger was not discovered by the defendant in time to avoid the injury." In *Dyerson* v. *Union Pacific Railway Co.*,[14] it was adjudged that the doctrine presupposes that the plaintiff's negligence was not active, continuing and concurring negligence, continuing up to the very time of the accident, and concurring therein, but was

[8] 146 Cal. 231.
[9] 42 Okla. 638.
[10] 77 Ark. 398.
[11] 138 Mich. 532.
[12] 81 Mo. App. 351, 409.
[13] 164 Fed. 41.
[14] 74 Kans. 528.

remote and antecedent. "To warrant the application there must have been some new breach of duty on the part of the defendant subsequent to the plaintiff's negligence." In *Erickson* v. *St. Paul, etc. R. Co.*,[15] the plaintiff who, after notice that a certain boiler was about to be tested in a reckless manner, persisted in standing by until it exploded, could not recover.

The court in *Green* v. *Los Angeles Terminal R. Co.*,[16] in speaking of the application of the doctrine of last clear chance, said that it applied in cases where the defendant knowing of the plaintiff's danger, and further knowing that he could not extricate himself from such danger, fails to do something which it is in his power to do to avoid the injury, but has no application to a case where both parties are guilty of concurrent acts of negligence, each of which at the very time when the accident occurs contributes to it.

The essential elements of the application of the doctrine according to the Montana Court of Appeals in the case of *Dohmer* v. *Northern Pacific Railroad Co.*[17] are as follows: 1. The exposed condition brought about by the negligence of the plaintiff or the person injured; 2, the actual discovery by the defendant of the perilous situation of the person or property in time to avert injury; and 3, the failure of the defendant thereafter to use ordinary care to avert the injury.

The writer having searched diligently through many texts on negligence, and having at his command the various cases in which the doctrine of last clear chance and the humanitarian doctrine are involved is unable to find to a very enlightening degree the exact distinction between these two rules.

As a general proposition it may be said that the doctrine of last clear chance is much broader than the humanitarian doctrine. In a majority of the states the former rule is applicable, while some five or six states hold to the latter rule. The humanitarian rule appears to be a strong application of the last clear chance rule, *i. e.*, much stronger than the general conception of the last clear chance rule.

In a recent Kentucky case, that of *Ross* v. *Louisville Taxicab and Transfer Co.*,[18] the decision was to the effect that the

[15] 146 Ia. 128.
[16] 76 Pac. 719.
[17] 48 Mont. 152.
[18] 202 Ky. 828.

plaintiff could recover under the humanitarian doctrine. According to the decisions handed down by the Kentucky Court of Appeals, the last clear chance doctrine has not been adhered to in Kentucky. This leads us to note the possible distinction between the two rules in question. The facts in *Ross* v. *Louisville Taxicab and Transfer Co.* are substantially as follows (as the plaintiff's evidence shows): Between the hours of nine and ten o'clock at night the plaintiff was crossing a street about midway of the block when he was struck by a taxicab operated by the defendants. Plaintiff's leg was broken and he brought this suit to recover for his injury. When the plaintiff started across the street he saw the taxicab approaching from the south three hundred feet away. Also a motorcycle coming from the north and over two hundred feet away. The street from curb to curb was thirty-eight feet wide. The taxicab struck the plaintiff when he was over two-thirds of the way across the street. There was a good arc light in the middle of the square which illuminated the street; the lights of the taxicab were burning brightly and there was nothing to prevent the chauffeur from seeing the plaintiff, as he was in plain view from the time he started across. The proof for the defendant is to the effect that plaintiff came out from behind a car that was parked on Third street eight or ten feet in front of the taxicab and too close to it to avoid injury to him after the peril was discovered.

The plaintiff asked the court to qualify the usual instructions on contributory negligence by adding to it these words: "Unless you should further believe from the evidence that before the accident that the chauffeur in charge of the taxicab saw, or by the exercise of ordinary care could have seen, plaintiff Ross far enough in front of him that said chauffeur could have, by the exercise of ordinary care, avoided the injury to plaintiff, but failed to do so, in which latter event the law is for the plaintiff and you will so find."

The court refused to do this and gave the usual contributory negligence instruction. This was error.

The Court of Appeals said: "The rule is that though the plaintiff may have been negligent in crossing the street, still he may recover if after his peril is discovered, or by ordinary care should be discovered, the driver of the vehicle by ordinary care may avoid the injury to him." This rule was first laid

down by the Court of Appeals in 1856. The following cases substantiate it: *L. & N. Railroad Co.* v. *Lowell*;[19] *Doll* v. *Louisville Railway Co.*,[20] and *I. C. R. R. Co.* v. *Pierce*.[21]

As above mentioned, the doctrine of last clear chance as a general rule has never prevailed in Kentucky. See *L. & N. R. R. Co.* v. *Trisler*,[22] *L. & N. R. R. Co.* v. *Potts*;[23] *L. & N. R. R. Co.* v. *Schmetzer*;[24] *L. & N. R. R. Co.* v. *Lowe*; *Kentucky & Indiana Bridge Co.* v. *Snydor*; [25] *I. C. R. R. Co.* v. *Murphy*.[26] In the Murphy case, Murphy was walking along the tracks of the company at a place where a lookout duty existed. The company was negligent in running its train too rapidly and in failing to give proper signals after Murphy's presence was discovered, yet it is clear from the opinion if he had looked he could have seen the train and saved himself, and so far as the last clear chance doctrine is concerned, it is likely that Murphy, who recovered in the action, had the last clear chance. In *I. C. R. R. Co.* v. *Flaherty*, [27] Flaherty was walking on the track, could have easily stepped out of danger when the cars were within a few feet of him, had he seen them, and he had only to look behind him to discover their approach. It further appears that no lookout was kept and that his danger could have been discovered by a proper lookout in time to warn him. In this action Flaherty recovered.

The last clear chance rule places the responsibility for the injury on the one who by the exercise of ordinary care had the last opportunity to avoid the injury, with contributory negligence available as a defense against the application of the rule. The humanitarian doctrine places the responsibility on the defendant, notwithstanding the continuing negligence of the plaintiff, if after the peril of the plaintiff is discovered, or by ordinary care should be discovered, the defendant by ordinary care may avoid the injury. Contributory negligence on the part of the plaintiff under the latter rule is limited as a defense.

[19] 118 Ky. 260.
[20] 138 Ky. 486.
[21] 175 Ky. 493.
[22] 140 Ky. 447, 451.
[23] 92 Ky. 31.
[24] 94 Ky. 424.
[25] 179 Ky. 18.
[26] 123 Ky. 787.
[27] 129 S. W. 558.

Under the humanitarian rule you are responsible when you injure a person, notwithstanding the contributory negligence of the injured person, if by the use of ordinary care you could have avoided injuring said person. Under the last clear chance you are responsible when you injure a person, if you had the last opportunity to avoid injuring such person and by the use or ordinary care could have avoided injuring said person.

The last clear chance doctrine is applicable to both the injury to person and property, while the humanitarian doctrine is applicable only, or almost exclusively, to injury to the person.

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